

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Curves International, Inc.,

Plaintiff,

vs.

Linda S. Mosbarger,

Defendant

Case Action No. 2007-CV-807-MHT

**MICHAEL GRAY, KEVIN AYERS,
AND JULIE FERRELL'S MOTION
TO DISMISS AMENDED ANSWER-
COUNTERCLAIM**

Michael Gray, Kevin Ayers, and Julie Ferrell move to dismiss with prejudice the Amended Answer-Counterclaim brought against them by defendant Linda Mosbarger ("Mosbarger"), pursuant to Federal Rules of Civil Procedure 12(b)(5), 12(b)(6), 13, and 14. Mosbarger has attempted to bring a "counterclaim" against three individuals who are not parties to this action. Mosbarger has not sought leave of court to add additional parties to this case, but has instead merely attempted to unilaterally add those parties by including them as part of an improperly designated "counterclaim." Mosbarger then attempted to serve that pleading by sending copies via certified mail to Michael Gray. Service of an initial pleading via certified mail is not proper under the Federal Rules of Civil Procedure. Nor was service proper upon Michael Gray, who was not authorized to accept service on behalf of Kevin Ayers or Julie Ferrell.

Even had Mosbarger properly added Gray, Ferrell, and Ayers as parties to this action, the claim she asserts against them fails to state a claim upon which relief can be granted. Mosbarger's Amended Answer-Counterclaim brings a single claim for criminal trespass against those individuals. Mosbarger lacks standing to bring a claim based on the violation of a criminal

statute. Moreover, the conduct of which Mosbarger complains does not state a claim for relief as a matter of law. Mosbarger fails to even allege that Kevin Ayers ever visited the property at which she alleges a criminal trespass occurred. Moreover, Mosbarger's own pleading admits that Mosbarger has leased the property and is not authorized to order any person to leave it. Most significantly, the conduct that Mosbarger describes represents no more than a factual investigation performed by Julie Ferrell and Michael Gray during normal business hours when the facility was open to the public. Mosbarger does not allege that the facility at issue was closed to the public, that she had authority to demand that Ferrell or Gray leave the property, or that Ferrell or Gray disobeyed such a demand.

This Motion is based on the accompanying Memorandum of Law, the Affidavit of Michael Gray, and all the files and proceedings herein.

Dated: December 21, 2007

**GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.**

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